

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO
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JEANELLIE NATAL-OLIVO,

Plaintiff,

v.

THE BOSS COLLECTION SERVICE,
INC., FNU SOSTRE, INSURANCE
COMPANY XYZ,

Defendant.

Civil No. 13-1232 (JAF)

5
6 **OPINION AND ORDER**

7 Plaintiff Jeanellie Natal-Olivo (“Natal”) originally claimed that Defendants, The
8 Boss Collection Service, Inc. (“Boss”), Abner García-Marcano (“García”), Jane Sostre or
9 FNU Sostre (“Sostre), and Komodidad Distributors, Inc. (“Komodidad”), had violated
10 her rights under the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692-
11 1692p. (Docket No. 2.) Since then, several defendants have been voluntarily dismissed.
12 (Docket No. 47.)

13 This order resolves four pending motions to dismiss filed by various defendants
14 (Docket Nos. 15, 26, 28, 48), Natal’s request for an order (Docket No. 22), and Boss’
15 motion for reconsideration (Docket No. 56). We find that the amended complaint (Docket
16 No. 46) survives all motions to dismiss. Therefore, we also end our abeyance of Natal’s
17 motion for summary judgment (Docket No. 14), and deny the motion to reconsider
18 (Docket No. 56).

I.**Procedural History**

On March 21, 2013, Natal filed her complaint. (Docket No. 2.) On May 28, 2013, she filed a motion for summary judgment. (Docket No. 14.) On June 11, 2013, García filed a motion to dismiss for lack of subject-matter jurisdiction, claiming that Natal's debt was a business debt and, therefore, not covered by FDCPA. (Docket No. 15.) On June 12, 2013, Boss and García moved us to hold in abeyance their opposition to Natal's motion for summary judgment pending a ruling on the motion to dismiss. (Docket No. 16.) On June 25, 2013, Natal amended her complaint. (Docket No. 17.) On July 1, 2013, we granted Boss and García's motion to hold their opposition to summary judgment in abeyance pending a ruling on the motion to dismiss. (Docket No. 21.) On July 10, 2013, Natal filed a motion requesting an order and expressing her opposition to the motion to dismiss. (Docket No. 22.) On August 8, 2013, García and Boss filed a joint motion to dismiss. (Docket No. 28.) On September 23, 2013, Natal filed a memorandum in opposition to the motion to dismiss. (Docket No. 34.) On October 7, 2013, Komodidad filed a reply to the response to the motion to dismiss. (Docket No. 40.) On October 7, García and Boss also filed a joint reply to the response to the motion to dismiss. (Docket No. 41.)

On October 25, 2013, Natal filed another amended complaint against only Sostre, Boss, and XYZ. (Docket No. 46.) On the same day, she filed a notice of voluntary dismissal without prejudice against the other codefendants – Komodidad and García. (Docket No. 47.) In the court filings, the defendant previously described as "Jane Sostre"

1 was replaced with “FNU Sostre.” On November 4, 2013, Boss filed another motion to
2 dismiss. (Docket No. 48.) On December 23, 2013, Natal filed a memorandum in
3 opposition to the motion to dismiss the second amended complaint. (Docket No. 21.) On
4 January 8, 2014, we ordered Natal to provide the alleged recordings of the conversations
5 she mentioned in her motion for summary judgment. (Docket No. 55.) On January 10,
6 2014, Boss moved us to reconsider and/or clarify that order. (Docket No. 56.)

7 II.

8 Facts

9 When considering a motion to dismiss, we must construe the complaint in the
10 plaintiff’s favor, accept all non-conclusory allegations as true, and draw any reasonable
11 inferences in favor of the plaintiff. Rodríguez-Ramos v. Hernández-Gregorat, 685 F.3d
12 34, 39-40 (1st Cir. 2010) (citation omitted). Therefore, to the extent that any facts are
13 disputed, the facts set forth below represent Natal’s version of the events at issue.

14 In December 2012, Natal visited a Gatsby’s store in Bayamón, Puerto Rico,
15 looking to purchase clothing for herself and her family. Gatsby operates as both a
16 wholesale and a retail store specializing in clothing, accessories, and fragrances.
17 Gatsby’s employee told Natal that she could become a “Gatsby partner,” which would
18 allow her to purchase clothes at a discount and under a credit agreement. (Docket No. 46
19 at 3.) Natal told the employee that she was only buying items for herself and her family,
20 and that she did not intend to resell any items. She asked if there was a minimum
21 purchase required, and the employee said there was not. The employee also said that
22 Natal would not be required to resell the merchandize. Natal then said that she only

1 wanted to buy clothes for herself and her family. (Docket No. 46 at 4.) Natal signed an
2 agreement for the “Gatsby partner” program. She saw that one paragraph was titled
3 “Commercial use,” but the employee told her to ignore that paragraph. (Docket No. 46 at
4 5.) Natal paid a membership fee. Upon signing the agreement, Natal purchased a few
5 items of clothing for herself and her family on credit. Over time, she continued to make
6 small purchases of clothes, accessories, and fragrances for herself and her family. Natal
7 only purchased single items of clothing, one fragrance, and two gift cards. She bought
8 twenty items or less in total, worth \$360. (Docket No. 46 at 6.)

9 Natal failed to pay back the credit. Gatsby placed two phone calls to Natal to
10 collect the debt, and then referred the debt to Boss, Gatsby’s debt collector. On
11 March 14, 2013, Sostre contacted Natal’s mother-in-law. She told the mother-in-law that
12 she was an “Agent”; that Natal owed \$504.20; that the debt was in default; that a lawsuit
13 was filed against Natal to collect the money; and that Natal was required to contact Sostre
14 within the next half hour, by 11:00 A.M. (Docket No. 46 at 7.) In response, Natal’s
15 husband called Sostre at approximately 11:00 A.M. Sostre told Natal’s husband the same
16 things, and additionally stated that if payment was not made, Natal’s personal references
17 and Natal herself would receive a citation for appearance before a court the following
18 Monday; that a payment plan was not possible; that an attorney was already involved in
19 the proceeding; that Natal would owe \$800 by the next day; that she would have to pay
20 an additional \$2,000 to \$2,500 on Monday if payment was not received; and that she was
21 going to be “convicted” if payment was not made. (Docket No. 46 at 8-9.) Natal’s
22 husband offered \$200 as partial payment to stop the judicial proceeding, and Sostre told

1 him to deposit the money in a checking account at Banco Popular. Sostre insisted that
2 payment was required to stop the proceedings and stop the “citation” of Natal’s personal
3 references. Sostre at all times represented herself as “Agent Sostre.” (Docket No. 46 at
4 9.) Sostre told Natal’s husband that payment of \$304.20 was required by March 15,
5 2013, at 11:00 A.M. (Docket No. 46 at 10.)

6 Natal called Sostre on March 14, 2013, at approximately 12:17 P.M. and identified
7 herself as the debtor. Sostre identified herself as a “prosecutor” who was collecting a
8 debt. Sostre said that a hearing would be held that Monday, March 18, 2013. She
9 repeated the payment amounts and increases stated in the last conversation. (Docket
10 No. 46 at 10-11.) Sostre cited a case number for the alleged court hearing. Sostre stated
11 that a payment plan was not a possibility. Natal borrowed money from family members
12 and made the complete payment on March 14, 2013, at approximately 1:20 P.M. (Docket
13 No. 46 at 11.) Sostre and Boss said that the judicial proceeding was closed due to Natal’s
14 payment. (Docket No. 46 at 12.)

15 III.

16 Analysis

17 A plaintiff’s complaint will survive a motion to dismiss if it alleges sufficient facts
18 to establish a plausible claim for relief. See Fed. R. Civ. P. 12(b)(6); Ashcroft v. Iqbal,
19 556 U.S. 662, 677 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).
20 In assessing a claim’s plausibility, the court must construe the complaint in the plaintiff’s
21 favor, accept all non-conclusory allegations as true, and draw any reasonable inferences
22 in favor of the plaintiff. Rodríguez-Ramos, 685 F.3d at 39-40 (citation omitted).

1 It should be noted that the only remaining defendants are Boss, FNU Sostre, and
2 Insurance Company XYZ. Defendants García and Komodidad have been voluntarily
3 dismissed. (Docket No. 47.) Therefore, Komodidad's motion to dismiss is now moot.
4 (Docket No. 26.)

5 **A. Dismissal for Lack of Subject-Matter Jurisdiction**

6 In their three motions to dismiss, Boss claims that the case must be dismissed for
7 lack of subject-matter jurisdiction. (Docket Nos. 15, 28, 48.) They claim that Natal
8 incurred a commercial debt rather than a personal debt, and that it is, therefore, not
9 covered by the Federal Debt Collection Practices Act ("FDCPA"). "Debt" under the act
10 is defined as,

11 any obligation or alleged obligation of a consumer to pay
12 money arising out of a transaction in which the money,
13 property, insurance, or services which are the subject of the
14 transaction are primarily for personal, family, or household
15 purposes, whether or not such obligation has been reduced to
16 judgment.

17
18 15 U.S.C. § 1692a. However, it is unclear that Natal incurred a commercial debt, rather
19 than a personal debt.

20 In support of their argument, Boss points to the clause in the agreement Natal
21 signed, entitled "commercial use," which states that "the merchandise purchase on credit
22 under this Agreement is for commercial use (that is, resale) and not for personal, family,
23 or home purposes." (Docket Nos. 48, 48-1) (sic).

24 There is no relevant case law in the First Circuit, so we look to other circuits for
25 guidance in deciding whether a debt is commercial or personal in the face of conflicting

1 evidence. To survive this motion, the Ninth Circuit and the Fifth Circuit have held that
2 “viewing the transaction as a whole,” the plaintiff must raise a genuine issue of material
3 fact as to whether the loan was primarily for consumer (personal) purposes. Slenk v.
4 Transworld Systems, Inc., 236 F.3d 1072, 1075 (9th Cir. 2001); see also Riviere v. Banner
5 Chevrolet, Inc., 184 F.3d 457, 462 (5th Cir. 1999). In these circuits, “[n]either the
6 lender’s motives nor the fashion in which the loan is memorialized are dispositive of this
7 inquiry.” Id. Instead, both courts stated that we should look to the “substance of the
8 transaction and the borrower’s purpose in obtaining the loan.” Id. The Fifth Circuit
9 stated that the borrower’s purpose is a factual determination that “hinges on [the
10 borrower’s] credibility.” Riviere, 184 F.3d at 462. In an analogous case, the Eastern
11 District of Virginia stated that “Plaintiff may well have violated the terms of the
12 [contract] by incurring personal debt with it, but that fact, even if true, cannot change the
13 character of the debt and take it out of the FDCPA’s jurisdiction.” Perk v. Worden, 475
14 F.Supp.2d 565, 570 (E.D.V.A. 2007).

15 We follow what appears to be a growing consensus. Because the text of the
16 contract is not dispositive, the borrower’s intent is a factual dispute between the two
17 parties. Because this is a credibility determination, we refrain from dismissal on this
18 ground.

19 **B. Dismissal for Failure to State a Claim Upon Which Relief Can Be Granted**

20 Boss argues that the FDCPA entitles them to rely on the information provided by
21 the original creditor and that they have no independent duty to investigate or verify a debt
22 referred for collection. (Docket No. 48.) Boss argues that they followed internal controls

1 adapted to avoid errors, and that an officer personally reviewed and relied in good faith
2 on the information provided by Gatsby. (Docket No. 48.) The FDCPA states that,

3 a debt collector may not be held liable in any action brought
4 under this subchapter if the debt collector shows by a
5 preponderance of evidence that the violation was not
6 intentional and resulted from a bona fide error
7 notwithstanding the maintenance of procedures reasonably
8 adapted to avoid any such error.

9
10 15 U.S.C. § 1692k(c).

11 There is no relevant case law in the First Circuit, so we look to other circuits for
12 guidance in deciding whether the bona fide error defense applies. The Seventh, Ninth,
13 and Tenth Circuits emphasized that a valid bona fide error defense is an objective test,
14 and must involve the maintenance of procedures that are “‘reasonably adapted’ to avoid
15 the specific error at issue.” McCollough v. Johnson, Rodenburg & Lauinger, LLC, 637
16 F.3d 939, 948 (9th Cir. 2011) (citations omitted); see also Johnson v. Riddle, 443 F.3d
17 723, 729 (10th Cir. 2006); Kort v. Diversified Collection Services, 394 F.3d 530, 539 (7th
18 Cir. 2005) (stating that the procedures must constitute a “reasonable precaution” to avoid
19 the error at issue). The Ninth Circuit also wrote that “[u]nwarranted reliance on a client
20 is not a procedure to avoid error.” McCollough, 637 F.3d at 948 (citations omitted).

21 From the limited information provided, we cannot say that the procedures
22 maintained by Boss were objectively reasonable to prevent this specific error -- the
23 collection of personal debts that are improperly memorialized as business debts in the
24 original agreement. Therefore, we refrain from dismissal on this ground.

1 **C. Motion for Reconsideration**

2 Boss moved us to reconsider and/or clarify our order regarding discovery of the
3 audio recording, arguing that summary judgment motions were held in abeyance. (Docket
4 No. 56.) Because we are denying Boss' motions to dismiss, we also end our abeyance of
5 Natal's motion for summary judgment. Therefore, we deny this motion for
6 reconsideration.

7 **IV.**

8 **Conclusion**

9 For the foregoing reasons, we hereby **DENY** Boss' motions to dismiss (Docket
10 Nos. 15, 28, 48). We **DENY** as moot Komodidad's motion to dismiss (Docket No. 26),
11 Natal's motion requesting an order (Docket No. 22), and Boss' motion to reconsider
12 and/or clarify our most recent order (Docket No. 56). We no longer hold Natal's motion
13 for summary judgment in abeyance (Docket No. 14). Remaining defendants have until
14 **January 27, 2014**, to file a Response to the motion for summary judgment (Docket
15 No. 14).

16 **IT IS SO ORDERED.**

17 San Juan, Puerto Rico, this 14th day of January, 2014.

18 S/José Antonio Fusté
19 JOSE ANTONIO FUSTE
20 U. S. DISTRICT JUDGE